93-574

OCT - 8 1993

CASE NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

NELSON RAMIREZ GONZALES,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

MICHAEL L. KINNEY
Post Office Box 18055
Tampa, Florida 33679-8055
(813) 875-5445

Counsel of Record for
Petitioner

QUESTIONS PRESENTED FOR REVIEW

Whether the Court of Appeals, by affirming the Medicare fraud conspiracy conviction of Petitioner, has sanctioned a departure from the accepted and usual course of judicial proceedings by the District Court because the evidence relied upon consisted of improper inferences.

PARTIES TO THE PROCEEDINGS IN THE COURT WHOSE JUDGMENT IS SOUGHT TO BE REVIEWED

1. United States of America, Appellee
2. Betty Jo Bertoncini, Appellant
3. Nelson Ramirez-Gonzalez, Appellant

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REFERENCE TO OFFICIAL AND UNOFFICIAL REPORTS OF OPINIONS BELOW

The judgment sought to be reviewed issued on May 12, 1993, has not reached the Federal Reporter System; it is docketed as Case No. 90-4088 in the United States Court of Appeals for the Eleventh Circuit (A 1-2); the accompanying opinion was entered the same day under the same style and number (A 3-6).

The prior withdrawn opinion was entered under that same style and number on February 24, 1993 (A 7-10).

STATEMENT OF GROUNDS FOR INVOKING THIS COURT'S JURISDICTION

The judgment sought to be reviewed was entered by the Court of Appeals on the 12th day of May 1993 (A 1-2).

The judgment sought to be reviewed was entered on rehearing wherein the original opinion and judgment were withdrawn.

By order of Justice Anthony M. Kennedy dated the 10th day of August, 1993, the time for filing this Petition of Writ of Certiorari was extended to and including October 8, 1993.

28 U.S.C. §1254 confers jurisdiction on this Court to review criminal convictions out of United States Courts of Appeals.

CONSTITUTIONAL AND

STATUTORY PROVISIONS INVOLVED

Constitutional

Fifth Amendment to the Constitution of the United States.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall nay person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for ones public use, without just compensation.

Statute

Title 18 U.S.C. §371

§371. Conspiracy to commit offense or to defraud United States

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy,

each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

STATEMENT OF THE CASE

The United States District Court, Middle District of Florida, was the Court of first instance. It had jurisdiction under Title 18 U.S.C. §3231.

DR. RAMIREZ was born in Cuba on January 28, 1941, and began his medical training there but completed it in three years in Madrid, Spain, from 1971 to 1973 (A 12).

He became licensed to practice medicine in Florida in 1976 and began a general practice involving both house calls and office practice, treating mostly elderly people (A 12-13).

DR. RAMIREZ first became acquainted with the TENS unit through a Mr. Cuerto of a medical supply company known as Duramedic (A 16-17). The TENS equipment (transcutaneous electrical nerve stimulator) operates to block certain pain nerve impulses to the brain to alleviate pain (A 22-28). It is not known why it works (A 28-29).

Through that meeting, he met Defendant, MORA, who later started his own company, Defendant, OSMOMEDIC (A 18, 38).

MORA, or one of his sales people, would give DR. RAMIREZ the names of prospective TENS patients and he would examine them to see if the use of the TENS unit was indicated (R5 6-8).

DR. RAMIREZ did not receive remuneration from MORA or any medical equipment provider he was connected with (A 36). MORA testified DR. RAMIREZ billed Medicare directly for his services (A 36).

There were a substantial number of patients that DR. RAMIREZ examined for whom he refused to prescribe a TENS unit (A 44, 20). MORA did testify that DR. RAMIREZ would sign prescription forms for specific patients for him for TENS units in blank and that he wanted MORA and OSMOMEDIC to provide five patients per day and he would only see MORA's referred patients (A 43, 31).

RAMIREZ was charged in Counts 1, 2, 3, 4, 5, 6, 7, 12, 15, 16, and 17 of a 29-Count indictment on 28 February 1990, in Tampa, Florida.

DR. RAMIREZ was found guilty in Counts One, Two, Three, Six, Seven, Twelve, Fifteen, Sixteen, and Seventeen but not guilty in Counts Four and Five (R11 14-16).

On November 9, 1990, DR. RAMIREZ was sentenced to imprisonment for thirty-seven months with three years of supervised probation thereafter (R12 10-11) and on December 14, 1990, he was released on bail pending the outcome of this appeal (R2 175 1-2).

ARGUMENT AMPLIFYING REASONS FOR GRANTING THE WRIT

The Government characterized the conspiracy throughout (Count One) as follows:

> . . . testimony of Oswaldo Mora showed that Dr. Ramirez-Gonzalez willfully became a member of a conspiracy designed to sell TENS units at the expense of Medicare and Medicaid. Mora and Dr. Ramirez-Gonzalez entered into an explicit arrangement in which Mora's company would find the patients and Dr. Ramirez-Gonzalez would prescribe TENS units.

(Government's Brief pp. 22-23
In the Court of Appeals)

A reading of the referenced portion of the record does not support this assertion.

There is a perfectly legal interpretation of the alleged explicit arrangement and that is that Dr. Ramirez would only prescribe medical equipment from Mr. Mora's company and then only when necessary. The Court of Appeals rejected such evidence in support

of a conspiracy in *United States v. Fernandez*, 892 F.2d 976 (11th Cir. 1989). In that case the Court of Appeals reversed a similar "wheel type" conspiracy conviction, stating:

> The Government sought to prove a "wheel" conspiracy with Miguel, the hub from which two spokes extended."
>
> (Citation omitted.)

Then, quoting with approval from *United States v. Levine*, 546 F.2d 658 (5th Cir. 1977), the Court went on:

> "For a wheel conspiracy to exist those people who form the wheel's spokes must have been aware of each other and must do something in furtherance of some single, illegal enterprise. *Blumenthal v. United States*, 332 U.S. 539, 556-57, 68 S.Ct. 248, 256-57, 92 L.Ed. 154 (1947)."

The entire record is devoid of any evidence that Petitioner here knew Dr. Bertoncini, a co-defendant below. In *Fernandez*, *supra*, the Court concluded:

> Accordingly, the evidence of the meeting at Miguel's home shows a discussion susceptible of either an

illegal or legal interpretation, and as such cannot be used to establish a conspiracy.

In fact, mention of TENS units is by Mr. Grosso, the prosecutor, who asked Mr. Mora, a co-conspirator, how many of such units Dr. Ramirez prescribed; not, if such prescriptions for each patient produced was part of the agreement.

Indeed, Mora having entered a plea and testifying for the Government stated on examination by the Government:

> Q. Did Dr. Ramirez ever refuse to sign an RX-1 or RX-2 prescription form?
>
> A. Yes. Many times he refused patients that did not need the unit.
>
> (A 44)
>
> * * *
>
> Q. Was there ever a time when Dr. Ramirez did not prescribe something for a patient?
>
> A. Well, when Dr. Ramirez would see that there was no necessity for anything, he would not prescribe.
>
> (A 44)

Obviously, the Government did not like this testimony but now elects to ignore it. On page 23 on the Government's brief is found the following assertion:

> The evidence showed a pattern: When a TENS salesperson referred a patient to Dr. Ramirez-Gonzalez, Dr. Ramirez-Gonzalez inevitably prescribed a TENS unit.
>
> (Emphasis supplied.)
>
> (Government's Brief, page 23, in the Court of Appeals.)

It is apparent from the above quoted portions of the record that often Dr. Ramirez did not even accept patients referred to him. Mr. Mora said:

> . . . many times he refused patients . . .

This, of course, would result in no file being opened and no record.

Nonetheless, the Government submitted as compelling that:

> A summary of Dr. Ramirez-Gonzalez records and those of Osmomedic, Duramedic, and Ultimate showed that of 171 patients referred to Dr. Ramirez-Gonzalez by Osmomedic and other medical equip-

ment companies, Dr. Ramirez-Gonzalez prescribed 151 TENS units. Exhibit 58.

(Government's Brief p. 13 in the Court of Appeals)

This was misleading. If, for instance, the unknown number of patients refused were 150, the Government's numbers are of little consequence in demonstrating that Dr. Ramirez inevitably prescribed TENS units for patients referred to him.

The Government did not prove the conspiracy!

In opposition to Dr. Ramirez' claim that he only exercised poor judgment, the Government stated that:

> The evidence showed a pattern; When a TENS salesperson referred a patient to Dr. Ramirez-Gonzalez, Dr. Ramirez-Gonzalez inevitably prescribed a TENS unit. This consistency rebuts Dr. Ramirez-Gonzalez' claim that the false statements an unnecessary medical equipment were the product of poor medical judgment.
>
> (Emphasis supplied.)
>
> (Government's Brief, p. 23, in the Court of Appeals.)

When properly viewed in light of legally acceptable proofs, no inference of a conspiracy can be drawn and remain consistent with the Fifth Amendment.

The Court is requested to take jurisdiction.

Respectfully submitted,

Michael L. Kinney
MICHAEL L. KINNEY
Post Office Box 18055
Tampa, Florida 33679-8055
(813) 875-5445

Counsel of Record for
Petitioner